Roseburg Forest Products Co. *and* Western Council of Industrial Workers. Case 36–CA–7722

August 9, 2000

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS LIEBMAN AND BRAME

Based on a charge filed January 12, 1996, by Western Council of Industrial Workers (the Union), the General Counsel of the National Labor Relations Board issued a complaint January 7, 1997, against Roseburg Forest Products Co. (the Respondent), alleging that it violated Section 8(a)(5) and (1) of the National Labor Relations Act by refusing to provide the Union with requested information. The Respondent filed a timely answer admitting in part and denying in part the allegations of the complaint and raising affirmative defenses.

On March 24, 1997, the Respondent, the Union, and the General Counsel filed with the Board a stipulation of facts and a motion to transfer this case to the Board. The parties agreed that the charge, the complaint, the answer to the complaint, and the stipulation, including attached exhibits, shall constitute the entire record in this proceeding and that no other testimony is necessary or desired. The parties further waived a hearing before an administrative law judge and the issuance of an administrative law judge's decision. On July 17, 1997, the Board approved the stipulation and transferred the proceeding to the Board for issuance of a Decision and Order. The General Counsel, the Respondent, and the Union each filed briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

On the entire record and the briefs, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a Delaware corporation, with its principal place of business and office in Roseburg, Oregon, is engaged in the business of wood products manufacturing. During the 12-month period preceding the filing of the complaint, the Respondent, in conducting its business operations, had gross sales of goods and services valued in excess of $500,000. Further, during the same time period, the Respondent sold and shipped goods or provided services of a total value in excess of $50,000 from its facilities within the State of Oregon, to customers outside the State of Oregon, or sold and shipped goods or provided services to customers within the State, which customers were themselves engaged in interstate commerce by other than indirect means. We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Stipulated Facts

On about December 10, 1992, the Respondent and the Union, by its Local 2949, entered into a collective-bargaining agreement (the contract) with a June 1, 1996 expiration date. The Union and the Respondent have since entered into a successor collective-bargaining agreement which is in full force and effect.

At all material times, Robert K. Wilson held the position of director of industrial relations for the Respondent and has been a supervisor within the meaning of Section 2(11) of the Act and an agent of the Respondent within the meaning of Section 2(13) of the Act. At all times material, Nelson D. Atkin II has been an attorney representing the Respondent and an agent of the Respondent within the meaning of Section 2(13) of the Act.

At all material times, Roger Bissonnette has been the business agent for the Union's Local 2949. At all material times, Michael T. Garone has been an attorney representing the Union.

The Respondent operates a plywood plant, commonly referred to as Plywood No. 1, in Dillard, Oregon, that is covered by the Contract. On about March 15, 1995,[1] the Respondent posted a bid sheet at Plywood No. 1 for two open jobs in the hardwood veneer sorter (helper) classification on day shift. Pursuant to article 8 of the contract, job openings in this classification are to be posted in the plant for 3 working days before being filled. The bids are to be considered jointly by the Respondent and the Union as to the employees' length of service and capability.

The hardwood veneer sorter (helper) job is a highly sought after job among the employees of Plywood No. 1 because it is not a physically demanding job and it operates on a straight dayshift basis. The majority of the other jobs in Plywood No. 1 operate on a rotating shift basis. Approximately 30 employees from Plywood No. 1 (there are approximately 300 employees plantwide) signed the bid sheet for the two openings. The senior bidders were C. O. Jefferson, with a seniority date of May 6, 1963, and Robert Cofer, with a seniority date of July 14, 1963. Three other employees had approximately 30 years seniority.[2] Numerous employees with 20 or so years of seniority signed the bid sheet, including Gary Booze, whose seniority date is July 5, 1973. Approximately 10 bidders had greater seniority than Booze.[3]

At the end of March, the Respondent awarded the two open hardwood veneer sorter (helper) jobs to C. O. Jefferson, the senior bidder, and to Gary Booze. On about

[1] All dates hereafter are in 1995, unless specified otherwise.

[2] These employees are Louis Reinhart, George Tarrant, and Jim Wilson.

[3] The parties agree, for purposes limited exclusively to this case, that all of the bidders who signed the bid sheet were capable of performing the job of hardwood veneer sorter (helper).

March 31, a grievance was filed by the Union alleging a seniority violation.

On about April 14, the Union and the Respondent met at step II of the grievance procedure to discuss the grievance. The union spokesman, Roger Bissonnette, advised the Respondent that the Union disagreed with its placement of a less senior person (Booze) in the hardwood veneer sorter (helper) classification. The Union advised the Respondent that the position was a straight dayshift job and that it takes about 30 years seniority to get the job. The Respondent's spokesman, Bob Wilson, told the Union that it placed Gary Booze in the job pursuant to his doctor's recommendation and in an attempt to accommodate Booze's disability according to what the Respondent believed was its responsibility under the Americans with Disabilities Act (ADA).[4] The Union asked if the Respondent had attempted to make other accommodations for Booze.

The second step meeting on the grievance was continued until May 24. At this time, union spokesman Bissonnette advised the Respondent of the Union's position that the Respondent could have made other accommodations for Booze on his regular bid job rather than placing him in a position which takes almost 30 years of seniority to obtain through the bid system. The Employer's spokesman, Bob Wilson, restated the Respondent's position that its actions in accommodating Booze were proper under the ADA. The Union indicated that it would process the grievance to the third step of the contractual grievance procedure.

A third step grievance meeting was held on June 28.[5] The Union again argued that, instead of violating the seniority provisions of the contract, the Respondent could have made other accommodations for Booze. The Union suggested as a possible accommodation assigning Booze to place putty on the ends of veneer, a job Booze had previously been assigned. The Respondent rejected this suggestion, claiming that it was not a full-time job. The Respondent again argued that the accommodations that it had made for Booze were made pursuant to his doctor's recommendations and in accordance with the ADA. The Respondent acknowledged that its actions in placing Booze in the position were in conflict with the Contract. The Union indicated that it would process the grievance further.

Under the contract, if a grievance is not resolved at the third step, the Union can either engage in economic action and/or bring an action for breach of contract in a court of competent jurisdiction. To date, the Union has taken neither action.

The Respondent never disclosed to the Union the nature of Booze's disability or physical condition during any step of the grievance procedure, nor did it disclose to the Union the contents of any medical records or the substance of Booze's doctor's opinions or conclusions.

On about July 25, the Union's attorney, Michael T. Garone, telephoned the Respondent's attorney, Nelson D. Atkin II, to discuss the grievance. Garone asked Atkin for information concerning Booze's physical condition and disability. Garone told Atkin that the Union needed to know the specifics of Booze's medical condition in order to determine whether the Respondent's accommodation of him was necessary and, further, to assess the Union's position concerning the grievance. There was general discussion concerning the requirements of the ADA and the confidentiality of medical information. Atkin did not divulge the information requested by the Union during this conversation, but agreed to get back to the Union with the Respondent's formal position in writing.

On about July 31 Atkin advised the Union by letter that the Respondent, relying on the ADA, was refusing to comply with the Union's request to release information concerning Booze's medical condition. Atkin indicated that if the Union obtained a written authorization to release medical information from Booze, the Respondent would release the information to the Union.

On September 21 the Union filed an unfair labor practice charge in Case 36–CA–7654, alleging that the Respondent violated Section 8(a)(5) and (1) of the Act by refusing to provide the requested information. On about October 30 Booze executed a written release authorizing the Respondent to divulge to the Union his entire personnel file, including any medical information it contained. The Union sent this release to the Respondent on about November 10. As a result of receiving this release from Booze, the Union withdrew the unfair labor practice charge in Case 36–CA–7654 on about December 7. During the period between October 30 and December 21, the Respondent did not divulge any medical information concerning Booze to the Union. On about December 21, Booze notified the Union and the Respondent that he had decided to rescind the permission he had previously given for release of his medical information.

During the first week of January 1996, Garone and Atkin again spoke by telephone concerning the grievance and Booze's rescission of the release. Garone restated the Union's request for and need for information regarding Booze's medical condition and the Respondent's accommodation decision. Atkin reiterated the Respondent's refusal to provide the requested information pursuant to the ADA. On January 12, 1996, the Union filed its charge in this case alleging that the Respondent violated Section 8(a)(5) of the Act by refusing to provide the Union with the requested information.

If called to testify as a witness, Roger Bissonnette would testify that the information requested by the Union concerning Booze's medical condition is necessary for

[4] 42 U.S.C. § 12101, et seq.

[5] Western Council Staff Representative Ken Devasier assisted Bissonnette as the union spokesman at this meeting.

the following reasons: (a) to enable the Union to represent its members as their exclusive collective-bargaining agent regarding the contractual seniority provisions as they relate to the alleged need to accommodate disabled employees; (b) to enable the Union to determine if there is some other accommodation that could be made for Booze's asserted disability; and (c) to enable the Union to determine whether to take economic and/or legal action concerning the grievance. The Respondent, despite its answer to the complaint, has stipulated that it would not call any witnesses to contradict this testimony.[6]

The Union has given the Respondent assurances that the Union would, upon receiving medical information concerning an employee for which accommodation was being sought, take all reasonable and necessary precautionary steps to ensure that only those with a "need to know" the information (for example, high-level Union decisionmakers, the Union's attorneys, union medical or vocational consultants) would receive the information which would otherwise be kept confidential.

On November 1, 1996, the U.S. Equal Employment Opportunity Commission (EE0C) issued an Opinion concerning this NLRB case which addressed the issue of how to resolve the potential conflict between the ADA confidentiality requirements pertaining to medical information, and a union's right to obtain certain information necessary to collective bargaining.[7]

The Union does not have any alternative access to any medical information concerning Booze which would have assisted it in: (1) determining what functional limitations exist to warrant an accommodation; or (2) determining if some other accommodation which does not require a breach of contract is feasible. The nature of Booze's disability is not readily apparent.

B. The Parties' Contentions

The complaint alleges that the Respondent violated Section 8(a)(5) by refusing to provide information that is relevant to and necessary for the processing of grievances or the administration of the collective-bargaining agreement.

The Respondent argues that the ADA requires it to keep employee medical records confidential and that therefore it is precluded by federal law from disclosing the requested information to the Union. The General Counsel and the Union argue, inter alia, that the agency responsible for applying the ADA, the Equal Employment Opportunity Commission, has already rejected the Respondent's argument that it is precluded from disclosing the requested information.

C. Discussion

An employer is obligated by Section 8(a)(5) of the Act to supply requested information that is potentially relevant and will be of use to the union in fulfilling its responsibilities as exclusive bargaining representative. *NLRB v. Acme Industrial Co*., 385 U.S. 432, 435–436 (1967). The standard for relevancy of the information sought by a union is a liberal, discovery-type standard, requiring that the information merely have some bearing on the issue between the parties, not that it be dispositive. Id. at 437 and fn. 6. A union's interest in the requested information, however, will not always predominate over other legitimate interests, such as an employer's need to keep the information confidential. *Detroit Edison Co. v. NLRB*, 440 U.S. 301, 314 (1979). As the Board stated in *Pennsylvania Power Co*., 301 NLRB 1104, 1105–1106 (1991):

> [I]n dealing with union requests for relevant, but assertedly confidential information, the Board is required to balance a union's need for the information against any "legitimate and substantial" confidentiality interests established by the employer. The appropriate accommodation necessarily depends on the particular circumstances of each case. The party asserting confidentiality has the burden of proof. Legitimate and substantial confidentiality and privacy claims will be upheld, but blanket claims of confidentiality will not. Further, a party refusing to supply information on confidentiality grounds has a duty to seek an accommodation. Thus, when a union is entitled to information concerning which an employer can legitimately claim a partial confidentiality interest, the employer must bargain toward an accommodation between the union's information needs and the employer's justified interests. [Footnotes omitted.]

Applying these principles, we find that the Respondent violated Section 8(a)(5) and (1) by refusing since July 31, 1995, to provide the Union with the requested information concerning Booze's medical condition and the Respondent's accommodation of his disability. There can be no doubt that the information sought by the Union is relevant and necessary for it to process the grievance it filed alleging that the Respondent violated the seniority provisions of the parties' collective-bargaining agreement by awarding the hardwood veneer sorter (helper) job to Booze. Thus, the stipulated record establishes that the Union had three separate needs for the requested information: (1) to enable the Union to represent employees adequately regarding the contractual seniority provisions as they relate to the alleged need to accommodate disabled employees; (2) to enable the Union to determine if there is some other possible accommodation of Booze's alleged disability; and (3) to enable the Union to determine whether to take economic and/or legal action

[6] The Respondent's answer denies the complaint allegation that the information requested by the Union is necessary for, and relevant to, the Union's performance of its duties as exclusive collective-bargaining representative.

[7] This opinion letter is reported in its entirety at the Fair Empl. Prac. Man. (BNA) No. 8, at 405:7527, and is discussed, infra. The letter will hereinafter be referred to as the "EEOC letter."

concerning the grievance.[8] In addition, the parties have stipulated that the nature of Booze's disability is not readily apparent and that the Union has no alternative access to any medical information concerning Booze's alleged disability. In sum, the record clearly shows that the Union cannot evaluate the merits of the grievance it filed without the requested information.

In light of the Union's request for relevant and necessary information, the Respondent was "required either to provide the information promptly . . . or to attempt to accommodate its confidentiality concerns and the Union's need for the information." *GTE Southwest Inc.,* 329 NLRB 563 (1999) (footnote omitted). Here, the Respondent did neither, and we find that it thereby violated Section 8(a)(5) and (1) of the Act. Id.

In so finding, we reject the Respondent's contention that the ADA flatly prohibits it from disclosing the requested information to the Union. In this connection, we rely on the EEOC's opinion letter addressing the specific facts of this case. The letter is signed by the EEOC's legal counsel and states that it "has been reviewed and approved by the Commission." (EEOC letter at 405:7530.) The EEOC phrased the issue before it as follows: "Does the ADA permit an employer to provide medical information about an employee's disability to a union in order for the union to assess a grievance challenging the employer's provision of a reasonable accommodation to the employee which conflicts with the seniority provisions of the [collective-bargaining agreement]?" (EEOC letter at 405:7528.)

In its analysis of this issue, the EEOC explained that, under Title I of the ADA, it is unlawful for a "covered entity" not to make a reasonable accommodation to known physical or mental limitations of otherwise qualified employees, unless there is undue hardship.[9] Title I defines "covered entity" to include both employers and unions.[10] Therefore, in the opinion of the EEOC, "a union, in its role as designated exclusive bargaining representative of the collective workforce, has a reasonable accommodation obligation under the ADA." (EEOC letter at 405:7528; footnote omitted.)

In addition, the opinion letter states that "[w]ith limited exceptions, Title I of the ADA obligates all covered entities to keep confidential any medical information obtained about . . . employees. Medical information includes specific information about an individual's disability and related functional limitations, as well as general statements that an individual has a disability or that an ADA reasonable accommodation has been provided for a particular individual." (EEOC letter at 405:7529–7530; footnotes omitted.)

Thus, under the EEOC's analysis, both an employer and a union, as "covered entities," are subject to the ADA's confidentiality requirements. However, the EEOC also states that medical information necessary to the reasonable accommodation process may be shared between an employer and a union in order to enable them to meet their reasonable accommodation obligations to a particular individual. The EEOC reasons as follows:

> In the unique setting of the unionized workplace, when an employer seeks to provide an accommodation that conflicts with collectively bargained seniority rules, the ADA reasonable accommodation obligation of the employer and of the union, as bargaining representative, are intertwined. The union and employer both participate in making the reasonable accommodation determination regarding a particular individual. It is the [EEOC]'s position that, where no other reasonable accommodation exists, the employer and union are jointly obligated to negotiate with each other to provide a variance if it will not impose undue hardship. [Footnote omitted.]
>
> Accordingly, . . . an employer and a union may share with each other and use medical information necessary to enable them to make reasonable accommodation determinations consistent with the ADA. [Footnote omitted.] When the need for an accommodation is not obvious, the employer and union may share reasonable documentation of the need for accommodation . . . .[13] Such information may only be shared with individuals with a need to know the information who are decision-makers or necessary consultants regarding the accommodation. [Footnote omitted.]
>
> [13] The information an employer may share with a union is strictly limited to that which is necessary for the union to fulfill its role in the accommodation process. Necessary information often will not encompass the entire contents of an employee's medical file.

[EEOC letter at 405:7529.]

Clearly, the EEOC has determined that the ADA does not preclude an employer from disclosing to the union information concerning an employee's disability and his need for accommodation. Indeed, regarding the particular facts of this case, the EEOC specified:

> [I]n this case, to make the reasonable accommodation determination, the ADA permits the Employer to give the Union medical information in the Employer's possession that is necessary to the accommodation process. If the need for accommodation is not obvious, the Employer may share documentation showing that [Gary Booze] has an ADA-covered disability, and stating the related functional limitations that necessitate the accommodation. Medical information may only be shared with individuals with a need to know the information who are decision-makers or necessary consultants regarding the accommodation.

[EEOC letter at 405:7530.]

[8] The Respondent, despite its answer to the complaint (see fn. 6, supra), has not presented any countervailing evidence.

[9] 42 U.S. § 12112(a) and (b)(5)(A); 29 CFR. § 1630.9.

[10] 42 U.S. § 12112(2); 29 CFR. § 1630.2.

The EEOC has the responsibility of interpreting and enforcing the ADA. As a matter of comity, we shall defer to its opinion that the "ADA permits an employer to give a union, in its role as bargaining unit representative, medical information necessary to the ADA reasonable accommodation process to enable the employer and union to make reasonable accommodation determinations consistent with the ADA." (EEOC letter at 405:7527.) See *PCC Structurals, Inc*., 330 NLRB 868 (2000) (Board guided by EEOC's interpretation of ADA's requirements), and *OXY USA, Inc*., 329 NLRB 208 (1999) (deferral to Department of Justice's interpretation of Section 302 of the Act). We can discern no basis for disregarding the EEOC's authoritative analysis of the ADA, especially as it pertains to the facts of this case. Furthermore, we find that the EEOC's interpretation strikes the appropriate balance between the confidentiality requirements of the ADA and the Union's right to relevant information under the NLRA.

Applying the framework set forth in the EEOC's opinion letter, we find that the ADA "permits" the Respondent to provide the Union with Booze's medical information, but the "information [the Respondent] may share with [the Union] is strictly limited to that which is necessary for [the Union] to fulfill its role in the accommodation process. Necessary information often will not encompass the entire contents of an employee's medical file." In other words, only that medical information concerning Booze that the Union truly needs may be disclosed to it. All other medical information must be kept confidential by the Respondent. Within this framework, there appears to be much for the parties to bargain about, and they are in the best position to determine how to arrive at a mutually acceptable accommodation of their respective interests.[11]

In these circumstances, we will not order the Respondent to furnish the requested information immediately. In similar cases, the Board has held that the appropriate remedy is to give the parties an opportunity to bargain in good faith regarding the conditions under which the union's need for relevant information could be satisfied with appropriate safeguards protective of the Respondent's legitimate confidentiality concerns. See, e.g., *GTE Southwest*, supra, and cases there cited. We find that approach appropriate here as well.

Under this approach, we recognize that if the Respondent and the Union are unable to reach agreement on a method of protecting their respective interests, the parties may be back before us again. If there is a question as to whether the parties have bargained in good faith, we shall make that determination. If need be, we shall balance the Union's right of access to relevant information against the Respondent's confidentiality concerns, in accordance with the principles set forth in *Detroit Edison*, supra. However, we believe that first allowing the parties an opportunity to resolve their differences best effectuates the Act's policy of maintaining industrial peace through the resolution of workplace disputes by collective bargaining.

ORDER

The National Labor Relations Board orders that the Respondent, Roseburg Forest Products Co., Roseburg, Oregon, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing or failing to bargain in good faith with Western Council of Industrial Workers as the exclusive collective-bargaining representative of the bargaining unit employees by refusing or failing to furnish the Union information relevant to the processing of grievances or the administration of the collective-bargaining agreement. The bargaining unit is:

> All production, maintenance and transportation employees and all temporary and part-time employees who perform work within the bargaining unit at the Respondent's Douglas and Lane County, Oregon sawmill, plywood, veneer, particleboard, and chip plants, excluding office and clerical employees, and guards, supervisors, quality and production control, technical and professional employees as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain collectively in good faith with the Union regarding the Union's July 25, 1995 request for information concerning Gary Booze's medical condition and the accommodation of his disability, and thereafter comply with the terms of any agreement reached through such bargaining.

(b) Within 14 days after service by the Region, post at its facility in Dillard, Oregon, copies of the attached notice marked "Appendix."[12] Copies of the notice, on forms provided by the Regional Director for Region 36, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event

[11] Topics for negotiations could include clarifying the somewhat imprecise nature of the Union's request and identifying the specific information that would be sufficient to satisfy the Union's three articulated needs, within the parameters set by the ADA, as defined in the EEOC's opinion letter.

[12] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 31, 1995.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to bargain in good faith with Western Council of Industrial Workers as the exclusive collective-bargaining representative of our bargaining unit by refusing to furnish the Union with information relevant to the processing of grievances or the administration of the collective-bargaining agreement. The bargaining unit is:

> All production, maintenance and transportation employees and all temporary and part-time employees who perform work within the bargaining unit at the Employer's Douglas and Lane County, Oregon sawmill, plywood, veneer, particleboard, and chip plants, excluding office and clerical employees, and guards, supervisors, quality and production control, technical and professional employees as defined in the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain collectively in good faith with the Union regarding its July 25, 1995 request for information concerning Gary Booze's medical condition and the accommodation of his disability, and thereafter comply with the terms of any agreement reached through such bargaining.

ROSEBURG FOREST PRODUCTS CO.